



Kenindia Assurance Co. Ltd v Kibuchi & Co. Advocates (Miscellaneous Civil Application 714 of 2018) [2024] KEHC 6996 (KLR) (Civ) (13 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6996 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CIVIL APPLICATION 714 OF 2018

CW MEOLI, J

JUNE 13, 2024

BETWEEN

KENINDIA ASSURANCE CO. LTD APPLICANT

AND

KIBUCHI & CO. ADVOCATES RESPONDENT

RULING

1. For determination is the Chamber Summons dated 04.08.2023 by Kenindia Assurance Co. Ltd (hereafter the Applicant) seeking inter alia that the decision of the taxing officer dated 08.02.2023 in respect of the Advocate-Client Bill of Costs dated 14.12.2018 be set-aside; the resultant certificate of taxation emanating from the decision of the taxing officer dated 06.03.2023 be recalled and annulled; and that the Advocate-Client Bill of Costs dated 14.12.2018, be remitted back to another taxing officer and the same be taxed afresh and/or the Court be pleased to tax afresh the items objected to and to render a decision thereon.
2. The summons is expressed to be brought pursuant to Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA) Paragraph 11(2) of the *Advocates Remuneration Order* (ARO), on grounds on the face thereof as amplified in the supporting affidavit sworn by Winnie A. Paul, described as the Nairobi Branch Manager of the Applicant, conversant, competent and with instructions to depose.
3. The gist of her deposition is that Kibuchi & Company Advocates (hereinafter the Respondent) filed a Bill of Costs in respect of Nairobi HCCA No. 200 of 2010 (hereafter the subject matter) which was determined vide a ruling delivered on 08.02.2023 and that the Applicant, aggrieved with the decision of the taxing officer therein, has filed the instant reference. She deposes that under Schedule VI, Para. 1 of the Advocates Remuneration Order (ARO), 2006, instruction fees are awarded on basis of the value of the subject matter as can be determined by pleadings, judgment or settlement; that the subject matter was dismissed for want of prosecution and therefore the taxing officer erred in law and principle



in allowing instruction fees as charged,; and that the amount thus awarded was exorbitant under to Paragraph 1(m) of Schedule VI of the ARO 2006.

4. The deponent further complains that the Bill of Costs appears to have been allowed as drawn despite being formally opposed by the Applicant through written submissions, manifesting an error of principle by the taxing officer. She goes on to state that the taxing officer in allowing all items as drawn failed to consider relevant factors and circumstances and further failed to give reasons for her decision. Besides, the Respondent's bill of costs was not drawn to scale as the items claimed in the said bill were unreasonable, unjustifiable and ought not to have been awarded in the circumstance.
5. The Chamber Summons was canvassed by way of written submissions, the Respondent having opted not to file any response to the reference.
6. Counsel for the Applicant began her submissions by restating the background events leading. In addressing instruction fees, counsel anchored her submission on the of-cited decision of *Joreth Limited v Kigano & Associates* (2002) EA 92 in supporting the submission that the value of the subject matter herein was neither indicated in the bill of costs nor ascertainable from the judgment or settlement. That from Item 1, the services rendered by the Respondent in the appeal from which the claim for fees arose were receiving the record of appeal, filing the application to dismiss the appeal, receiving grounds of opposition as well as amending and filing the notice of motion among other incidentals. It was further argued that the fact that the proceedings were straightforward, ought to have reflected in the amount awarded as Instruction Fees. Therefore, the amount of Kshs. 70,000/- as sought had no basis being unascertained from the pleadings, judgment or settlement, and hence the taxing officer erred in allowing the exorbitant instruction fees charged. Whereas Para. 1(m) of Schedule VI of the ARO stipulates the award of a reasonable sum, to which this Court ought to find as such.
7. Concerning Court attendances as captured in items 7, 8, 9, 10 & 11 counsel submitted that there was nothing to guide the taxing officer in assessing proper attendances necessitating calling for the parent file. That pursuant to Para. 61 of the ARO as read with Schedule 6 Para. 7(d), any expenses incurred unnecessarily or due to any misconduct or default of the advocate should not be charged against the client. Therefore, adjournments occasioned by the Respondent ought to have been taxed off, with the respective attendance costs being taxed at Kshs. 2,100/-. Counsel thus argued that the taxing officer fell in error when she taxed the attendance at Kshs. 5,000/-.
8. Citing *Ngatia & Associates v Interactive Gaming & Lotteries Limited* [2017] eKLR counsel asserted that disbursements must be specifically proved by way of receipts or be disallowed. The Court was thus urged to tax off Items 17 & 18 as the same were inflated and unsupported by evidence by way of receipts. Counsel further argued that the Respondent's bill of costs conceded receipt of Kshs. 35,000/- which amount ought to have been considered by the taxing officer in her final award. The decision in *Nyaundi Tuiyott v Tarita Development Limited* [2016] eKLR was cited in the latter regard. In conclusion, the Court was urged to allow the reference and set aside the award of the taxing officer.
9. The Respondent on its part defended the taxing officer's decision citing the decision in *First American Bank of Kenya Ltd v Gulab P. Shah & 2 Others* [2002] eKLR regarding the remit of the court's discretion to interfere with the decision of the taxing officer. Responding to the Applicant's submissions on instruction fees, counsel relied on the decision in Ochieng, Onyango, *Kibet and Ohaga Advocates v Adopt-a-Light Ltd*, HC. Misc. 729 of 2006 to submit that the subject sum in contention was Kshs. 168,805/- in respect of the lower suit filed in 2006 and the subsequent appeal filed in 2010. Hence, based on Schedule VI of the ARO 2006 alongside factors such as the industry, time and general conduct of the appeal proceedings, the instruction fees allowed by the learned taxing officer was reasonable. That the sum of Kshs. 73,500/- was provided for in the ARO 2006, considering the subject



sum of the matter. Further that the bill of costs demonstrates various attendances by counsel and work carried out in defence of the Applicant on appeal. It was argued that the taxing officer considered all the relevant factors in the circumstance in taxing instruction fees

10. In response to the Applicant's submissions on attendances, it was submitted that Para. 7(d)(iii) of Schedule VI of the ARO provides for attendances at Kshs. 5,040/- on the higher scale whereas the Applicant's claim for Kshs. 2,100/- is prescribed for attendances that last for an hour. Therefore, given that counsel appearing in the matter took more than two (2) hours in each attendance, the sum of Kshs. 5,000/- proposed in the bill of costs was justified and taxed accordingly.
11. On disbursements, counsel argued that denying the Respondent costs under Items 17 and 18 would amount to an injustice as it is obvious that the costs were incurred. In addition, that it was not a mandatory requirement under the ARO to tender receipts for all disbursements charged in a bill of costs. It was further submitted that the taxing officer is allowed to award costs in respect of disbursements as he deems reasonable. Concerning reasons for taxation, it was summarily argued that the taxing officer allowed the bill of costs as drawn since she deemed that it had been reasonably drawn to scale. In conclusion, counsel urged the Court not to disturb the decision of the taxing officer.
12. The Court has considered the grounds of the reference as well as rival material and submissions. Equally, the Court has perused the record herein. In *Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd* [1972] EA 162, Spry, V-P. stated at p.164 that:

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.”

13. The Court of Appeal in that case proceeded to lay down some principles to undergird the exercise of discretion by taxing officers in the assessment of costs, as follows:-

“

- “(a) that costs be not allowed to rise to such a level as to limit access to the courts to the wealthy only;
- (b) that a successful litigant ought to be fairly reimbursed for the costs he has had to incur;
- (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession; and
- (d) that so far as practicable there should be consistency in the awards made.”

See also *Rodgers Mwema Nzioka v The Attorney General & 9 Others* (2007) eKLR and *Rogan Kamper v Grosvenor* (1978) eKLR.

1. The foregoing counsel was applied by Ojwang J (as he then was) in *Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others* (2006) eKLR. The learned Judge observed that:-

“Discretion, as an aspect of judicial decision-making, is to be guided by principles, the elements of which are clearly stated, and which are logical and conscientiously



conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs... Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the taxing officer is to provide only for reasonable compensation for work done; the taxing officer should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that ends to be usurious; so far as possible, the taxing officer should apply the test of comparability; the taxing officer should endeavour to achieve objectivity when considering ill-defined criteria such as public policy, interests affected, importance of matter to parties, or importance of matter to the public; the taxing officer should clearly identify any elements of complexity in the issues before the Court – and in this regard should revert to the perception and mode of analysis and determination adopted by the trial judge; the taxing officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer should determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel.”

15. Similarly, Ringera, J (as he then was) in *First American Bank of Kenya v. Shah & Others* [2002] 1 E.A. 64 at p.69, stated; -

“First, I find that on the authorities, this Court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.... Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge. Needless to state not all the above factors may exist in any given case, and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the Court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment.”

16. With the foregoing principles in mind, the Court has considered the respective parties’ arguments. The Applicant’s reference in respect of the Bill of Costs dated 14.12.2018, appears to be premised upon instruction fees in Items 1 taxed at Kshs. 70,000/-, Attendances in Items 7-11 taxed at Kshs 5,000/- each and Disbursements in Items 17 & 18 taxed at Kshs. 15,000/- and Kshs. 20,000/- respectively. However, alongside the complaints specific to items, the reference is also premised on the general complaint that the taxing officer failed, firstly, to consider relevant factors, the circumstances in the taxation of the bill of costs and, secondly, to give reasons for her decision on the Respondent’s bill of costs. The latter



assertedly not drawn to scale given that the sums claimed therein were not reasonable and should be disallowed. In a brief ruling on the bill of costs, the taxing officer summarily stated as follows; -

“This is a ruling on an Advocate-Client BOC dated 14/12/2018. Same taxed under 1997 R.O on a primary suit filed in 2003. The Items are reasonably drawn to scale and the BOC is allowed as drawn.” (sic)

17. The Court of Appeal in *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR stated as follows in respect of reference before a Judge; -

“On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:

“Where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases”.

An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see *Arthur v Nyeri Electricity Undertaking* (supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see *Devshi Dhanji v Kanji Naran Patel* (No. 2), [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - *D’Souza v Ferrao* [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji v Kanji Naran Patel* (No. 2) (supra).

18. Here, it is evident that the Bill of Costs was strongly challenged by the Applicants in their submissions. The taxing officer allowed the Bill of Costs as drawn on grounds that it was “reasonably drawn”. The ruling did not restate the respective parties’ arguments on the Bill of costs and disputed matters calling for determination. Nor contain any evidence of the application of any specific part of the Advocates Remuneration Order to any Item in the Bill of Costs, or reasoning of the taxing officer justifying the summary characterization of the Bill as “reasonably drawn” to scale. The taxing officer ought to have addressed herself to each of the contested Items. A general citing of the applicable Advocate Remuneration Order could not suffice.
19. Taxation is not a mathematical exercise, and the taxing officer enjoys wide latitude or discretion. However, as observed by Ojwang J (as he then was) in *Ex-parte Samuel Muchiri W’Njuguna & 6 others* (supra), taxation of costs is a judicial function to be conducted regularly, based on rational established criteria encapsulated in principles, which are clearly expressed for the parties to perceive with ease. As things stand, the Court itself is unable to deduce, and therefore interrogate the correctness of the criteria and reasoning by which the taxing officer arrived at her conclusion that the Bill of Costs before her was drawn to scale.
20. In the court’s considered view, the taxing officer’s summary ruling, devoid of reasons, appears irregular and in the circumstance did not do justice to the parties’ respective submissions on the contested Bill of Costs. In the circumstances, the Applicant’s reference must be allowed with costs. The decision of



the taxing officer dated 08.02.2023 is hereby set aside and the subject bill of costs will be taxed afresh before a different taxing officer on the date to be set immediately after this ruling.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF JUNE 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Achieng

For the Respondent: Ms. Nambunge

C/A: Erick

